No. 97-371

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,

Petitioners,

—v.—

KAREN FINLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CLAES OLDENBURG, ARTHUR MILLER, JASPER JOHNS, HANS HAACKE, COOSJE VAN BRUGGEN, E.L. DOCTOROW, NANCY SPERO, LEON GOLUB, ANDRES SERRANO, ROBERT COLESCOTT, TONY KUSHNER, LUIS CRUZ AZACETA, TERRENCE McNALLY, BARBARA KRUGER, DAVID HAMMONS, ADRIAN PIPER, SUSAN ROTHENBERG, BRUCE NAUMAN, ERICA JONG, AND RICHARD SERRA, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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Claes Oldenburg, Arthur Miller, Jasper Johns, Hans Haacke, Coosje van Bruggen, E.L. Doctorow, Nancy Spero, Leon Golub, Andres Serrano, Robert Colescott, Tony Kushner, Luis Cruz Azaceta, Terrence McNally, Barbara Kruger, David Hammons, Adrian Piper, Susan Rothenberg, Bruce Nauman, Erica Jong, and Richard Serra submit this brief as *amici curiae* in support of respondents. The parties to the action have given their written consent to the filing of this brief pursuant to Rule 37.3(a) of the Rules of this Court. The letters of consent have been filed with the Clerk.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are 20 distinguished visual and literary artists, who share an interest that the creation of art be judged on standards of excellence and merit that are free of restrictions based on the viewpoint of the artist. Because the *amici* have extensive experience in the arts, they believe that they can offer the Court views about the creation and evaluation of the arts that are relevant to the Court's consideration of the issues in this case.

The visual artists among the *amici* have created works—sculpture, paintings, constructions, prints, photographs—that exemplify many of the major artistic movements since the 1940s. Works of these artists are included in the permanent collections of major museums in the United States and abroad, including the Smithsonian Institution, the National Gallery of Art, the Metropolitan Museum of Art, the Museum of Modern Art, the Art Institute of Chicago, the Pompidou Center in Paris, the Tate Gallery in London, the National Gallery of Canada, and the National Gallery of Australia.

The literary artists among the *amici* have created novels and plays that are read and produced worldwide, and the excellence of their work has been recognized with awards, such as the Pulitzer Prize, the Antoinette Perry Award (the "Tony"), the Emmy Award and the National Book Award.

Some of the *amici* have served on NEA panels of experts, and one was the recipient of an NEA grant earlier in her career.

The *amici* use their work as a vehicle for the expression of ideas, viewpoints, or beliefs, and they are troubled by any governmental effort to control protected expression in artistic work—whether directly or indirectly—through the selective withholding of subsidies. A work of one of the *amici*, Andres Serrano, which appeared in an NEA-funded exhibition, was attacked during the 1989 and 1990 congressional debates regarding the NEA, and the institution that exhibited the work was subsequently penalized, because some congressional representatives and their constituents perceived the work as blasphemous.

The work of visual and literary artists is often intended to challenge the viewer or reader and to provoke thought. The imposition of vague, viewpoint-based restrictions, such as the "decency" and "respect" provisions at issue in this case, as criteria for funding the arts infringes protected First Amendment expression. These provisions authorize public officials to apply such standards based on their personal interpretations, and they cause artists and arts organizations that rely on public funding to engage in self-censorship rather than risk the loss of funding. Not only do such vague standards squelch creativity and artistic innovation, they foster the proliferation of art striving to satisfy the lowest common denominator. Because the *amici* are concerned that artistic expression not be subjected to government censorship in the form of vague restrictions that invite judgment based on viewpoint, they join in urging this Court to affirm the court of appeals' decision.

SUMMARY OF ARGUMENT

1. The "decency" and "respect" provisions of the NEA statute conflict with the Fifth Amendment because they are unconstitutionally vague. Neither "general standards of

decency" nor "respect for the diverse beliefs and values of the American public" are terms that can be understood--without guesswork—either by NEA applicants or NEA personnel charged with making the funding decisions. Depending upon the perspective of the decision-maker, such terms could encompass much of the art that we flock to museums to see, because it might offend some Americans' views of what is politically correct, morally acceptable, sexually restrained, or religiously orthodox.

The vagueness of the terms makes the statute vulnerable to the very ills that the vagueness doctrine is meant to prevent: the exercise of unbridled discretion by the decision-maker and self-censorship by applicants anxious to avoid the statutory prohibitions.

2. The statutory standards of "artistic excellence" and "artistic merit" are not unconstitutionally vague. To evaluate art in a meaningful sense, the evaluator must have knowledge about the art work in question, experience in looking at similar works, and understanding of the history of art and recent developments in the art world. By requiring that the NEA advisory panels and the NEA Council be comprised of individuals knowledgeable in the arts, Congress recognized that such experts would have the requisite experience to make fair and informed decisions when determining which works have artistic excellence and merit. The expertise that qualifies the NEA panelists and Council members to make judgments about artistic merit, however, does not include reference to "standards of decency" and the "respect for the diverse beliefs and values of the American public." Furthermore, no definition of "artistic excellence" and "artistic merit" can include the conformity and orthodoxy necessarily imposed by the "decency" and "respect" provisions, because such standards are fundamentally antithetical to the making of art.

ARGUMENT

I

THE "DECENCY" AND "RESPECT" PROVISIONS OF THE NEA STATUTE ARE UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH AMENDMENT

On November 5, 1990, Congress passed the Arts, Humanities and Museum Amendments of 1990 (the "Act"), as the finale to a year of contentious debate brought about by congressional efforts to dictate the content and viewpoint of art funded by the National Endowment for the Arts ("NEA").[1] The Act amended the enabling legislation in certain respects; in particular, it amended 20 U.S.C. § 954(d) so that it now reads in pertinent part:

> No payment shall be made under this section except . . . in accordance with regulations issued and procedures established by the [NEA] Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> > (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
> >
> > (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity . . . shall not be funded. . . .

(the " 'decency' and 'respect' provisions" or "Section 954 (d)(1)").

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[1] Pet. App. 102a-103a. Pub. L. No. 101-512, § 318, 104 Stat. 1960 (1990), *reprinted in* 1990 U.S.C.C.A.N. (104 Stat.) 1960. Title I of the Act amended the National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. §§ 951 *et seq.*

Thus, under the amended statute, awards of NEA grants are ultimately contingent upon the NEA Chairperson's determination that the applications are consistent with "general standards of decency" and with "respect for the diverse beliefs and values of the American public." As implemented by the NEA Chairperson, each member of the peer review panels that review applications for NEA grants, each member of the National Council that advises the Chairperson, and all the state, local, and private arts organizations authorized to make subgrants of NEA funds are all charged with ensuring that their decisions consider "general standards of decency" and "respect for the diverse beliefs and values of the American public."[2]

Upon challenge by respondents, both the district court, Pet. App. 76a-78a, and the court of appeals, Pet. App. 14a-19a, invalidated the "decency" and "respect" provisions as unconstitutionally vague in violation of the Fifth Amendment's due process clause. As the court of appeals recognized, the "decency" and "respect" provisions are unconstitutional because " 'no standard of conduct is specified at all' " and "the statute thus provides no 'ascertainable standard for inclusion and exclusion.' " Pet. App. 17a (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) and *Smith v. Goguen*, 415 U.S. 566, 578 (1974)).

In the face of these holdings, the NEA persists in its contention that "Congress's use of imprecise terms in awarding grants does not penalize speech in any meaningful sense." Pet. Br. 47. This contention completely ignores the well-established principle that when a vague statute touches

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[2] *See* J.A. 12, 33; *Department of the Interior and Related Agencies Appropriations for 1992, Hearings before the Subcomm. on the Dep't of the Interior and Related Agencies of the House Comm. on Appropriations*, 102d Cong., 1st Sess. 234 (Feb. 21, 1991) (testimony of NEA Chairperson John Frohnmayer); *Department of the Interior and Related Agencies Appropriations for 1993, Hearings Before the Subcomm. on the Dep't of the Interior and Related Agencies of the House Comm. on Appropriations*, 102 Cong., 2d Sess. 613-14 (May 5, 1992) (testimony of NEA Chairperson Anne-Imelda Radice).

protected First Amendment expression, the vagueness doctrine "demands a greater degree of specificity than in other contexts." *Smith*, 415 U.S. at 573; *Buckley v. Valeo*, 424 U.S. 1, 41 (1976). And while a greater degree of vagueness is tolerated with respect to civil enactments because the consequences are less severe, that exception does not apply where a statute's vagueness "threatens to inhibit the exercise of constitutionally protected rights . . . [such as] free speech." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967). Section 954(d)(1)'s requirement that the evaluation of grant applications take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" does not satisfy, in any respect, the "greater specificity" standard required by *Smith* and *Hoffman*.

A. "General Standards Of Decency"

On its face, "decency" is defined in terms of vague and undefined standards of propriety or morality. According to The American Heritage Dictionary of the English Language 483 (3d ed. 1996), "decency" is

> the state or quality of being decent; propriety. . . . Conforming to prevailing standards or propriety or modesty,

and "decent" is

> characterized by conformity to recognized standards of propriety or morality. . . . Free from indelicacy; modest. . . . Meeting acceptable standards; adequate. . . . Morally upright; respectable. . . .

Such definitions do not provide the greater specificity required by *Smith* and *Hoffman* to save the phrase "general standards of decency" from unconstitutional vagueness. They provide artists and art institutions no guidance whatsoever about what qualities or elements, if found in an artistic work,

would trigger rejection under Section 954(d)(1), and they do not prescribe explicit standards for NEA judging officials to use in making funding determinations. As the court of appeals noted, "[the NEA decision-makers] have no . . . expertise in applying such free-floating concepts as 'decency' and 'respect.' " Pet. App. 19a n.18. Just as "one man's vulgarity [may be] another's lyric" (*Cohen v. California*, 403 U.S. 15, 25 (1971)), so too may works of art be "decent" or not depending on a viewer's own particular background and personal philosophy. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 742 (1978) ("for indecency is largely a function of context—it cannot be adequately judged in the abstract").

For example, what is "decent" is likely to run afoul of some viewer's standards of propriety regarding sexuality and nudity. Examples of art works that have provoked objections to allegedly explicit sexuality or excessive nudity range from Michelangelo's Last Judgment (1534-41) (App. 2a), to Rodin's "The Kiss" (1886-98) (App. 3a), to Édouard Manet's 1863 "Déjeuner sur l'herbe" (Luncheon on the Grass) (App. 4a), to much of the work of Egon Schiele,[3] whose oeuvre was recently featured in a retrospective exhibition at the Museum of Modern Art in New York City. In fact, Schiele's work was so offensive to his Austrian contemporaries, that in 1913 he was convicted of creating pornography at a trial during which the judge burned one of his pictures in the courtroom.[4] Although Michelangelo's "David" (1501-1504) (App. 5a) and Henri Matisse's "Hindu Pose" (1923) (App. 6a) managed to escape serious censure in their own times, each has been the subject of outrage in modern times: a replica of the David was seized in 1966 in Beverly Hills for "appearing without a figleaf" and the U.S. Post Office revoked the mailing permit

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[3] Jane Clapp, *Art Censorship: A Chronology of Proscribed and Prescribed Art*, 143-45, 167, 369 (1972).

[4] Frank Whitford, *Egon Schiele* 115 (1981).

of an issue of a fine arts publication because it contained reproductions of nudes, including "Hindu Pose."[5]

Even assuming that an artist applying for a grant could hazard a guess about what is meant by "decency" in the statute, the applicant could never know with any degree of certainty what is the "general standard" referred to in the statute or what "general standard" NEA decision-makers were using. Is the same general standard applied in Kansas City and New York City? If there are differing standards, who decides which standard to apply?

In *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997), this Court considered the Communications Decency Act of 1996 (the "CDA") which attempted to restrict access to speech on the Internet that was "indecent." 47 U.S.C. § 223(a) (Supp.1997). Like the NEA "decency" and "respect" provisions, the CDA did not further define or qualify "indecent." This Court invalidated the decency provision of the CDA statute, concluding that the vagueness of such terminology raised special constitutional concerns because of its "obvious chilling effect on free speech." *Reno*, 117 S.Ct at 2344. The NEA "decency" provision suffers from the same defect. Without further definition, "general standards of decency" provides no standard at all; worse, such a vague formulation both encourages the rejection of art because of the viewpoint the art may express and dampens the free expression of ideas by artists and arts organizations that seek NEA funding.

B. "Respect For The Diverse Beliefs And Values Of The American Public"

The meaning of the phrase "diverse beliefs and values of the American public" is as opaque as is "general standards of decency." Which particular set of beliefs and values is to

[5] Clapp, *supra* note 3, at 265, 323-25, 369.

serve as the standard for selection? Although the statute recognizes that the beliefs and values of the American public are "diverse," it fails to indicate which values should prevail if respecting one set of values means offending another. Who is to make this subjective judgment? Since Section 954(d)(1) designates the NEA's Chairperson as the final arbiter of what art conforms to the "decency" and "respect" provisions, does this mean that the Chairperson is empowered to reject any grant application that he or she believes criticizes or questions the political, religious, or moral values of some part of the American public?

"Respect for the diverse beliefs and values of the American public" is necessarily defined with reference to religion, politics, racial or ethnic attitudes, and attitudes about human sexuality, among other beliefs and values. Within each of these spheres, there is ample potential for discordant views and attitudes, depending upon the point of view of the person doing the evaluating.

Assuming that religion is included among the American beliefs and values that an arts grant must respect, it is quite possible that depicting religious figures or symbols in unconventional contexts or in unflattering postures may be considered indecent or disrespectful. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952) ("In seeking to apply the broad and all-inclusive definition of 'sacrilegious' . . . the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies").

For example, Paolo Veronese's 1573 painting "Christ in the House of Levi" (App. 7a) now hanging in the Galleria dell'Accademia in Venice, was criticized by the religious tribunal of the Inquisition because it included figures—a dwarf, jesters, servants, and a dog—considered inappro-

priate alongside the Holy Figures.[6] Michelangelo's "Last Judgment" (App. 2a) (1534-41) was censored in part because of the nudity of the figures, a defect that Pope Paul IV finally cured in 1558 by having draperies and loincloths painted over the offending body parts;[7] and Caravaggio's "Death of the Virgin" (1605-06) (App. 8a), first commissioned as an altarpiece, was then rejected as blasphemous because the Virgin

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6 H.W. Janson and Anthony F. Janson, *History of Art* 494-95 (5th ed. rev. 1997). The painting was originally known as "The Last Supper." On July 17, 1573, Veronese was summoned by the Holy Office to be questioned before the Holy Tribunal, Paolo Caliari of Verona:

> . . . Q: Who are at the table of Our Lord?
>
> A: The Twelve Apostles.
>
> Q: What is St. Peter, the first one, doing?
>
> A: Carving the lamb in order to pass it to the other end of the table.
>
> Q: What is the Apostle next to him doing?
>
> A: He is holding a dish in order to receive what St. Peter will give him.
>
> Q: Tell us what the one next to this one is doing.
>
> A: He has a toothpick and cleans his teeth . . .
>
> Q: Did any one commission you to paint Germans, buffoons, and similar things in that picture?
>
> A: No, milords, but I received the commission to decorate the picture as I saw fit. It is large and, it seemed to me, it could hold many figures.
>
> Q: Are not the decorations which you painters are accustomed to add to paintings or pictures supposed to be suitable and proper to the subject and the principal figures or are they for pleasure—simply what comes to your imagination without any discretion or judiciousness?
>
> A: I paint pictures as well as I see fit and as well as my talent permits.

Id. at 634-65. To appease his critics, the artist consented to changing the title to "Christ in the House of Levi." *Id.* at 495.

7 Clapp, *supra* note 3, at 61. Moshe Carmilly-Weinberger, *Fear of Art: Censorship and Freedom of Expression in Art* 17-18 (1986).

figure in the picture was modeled after a prostitute and was bare-footed.[8]

Although it is easy to dismiss such attitudes as the unenlightened views of the 16th and 17th centuries, recent history shows that artists are not immune from those who consider blasphemous the use of religious symbols in artistic expression. For example, in 1928 George Grosz, a well-known German artist, and his publisher were prosecuted for depicting "Christ in a Gas Mask" (App. 9a).[9] In 1991, a "photo-allegory" by the artist Duane Michals drew criticism for depicting a crucifix, pointed gun-like at the head of a victim, to show the artist's belief that "no American has the right to impose his private morality on any other American" (App. 10a).[10] And Senator Jesse Helms used Andres Serrano's 1987 photograph "Piss Christ" (App. 11a) as a focal point in his attack on the NEA's 1989 appropriations.[11] If offending religious sensibilities is a criterion for denying NEA funds, such a rule might exclude Max Ernst's 1926 "The Holy Virgin Chastising the Infant Jesus Before Three Witnesses: Andre Breton, Paul Éluard and the Artist" (App. 12a) and Francis Bacon's 1953 "Study After Velasquez's Portrait of Pope Innocent X" (App. 13a), among countless other visual art works and works of literature, opera and theater.

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8 Pamela Askew, *Caravaggio's Death of the Virgin* 50-68 (1990); Helen Gardner, *Gardner's Art Through the Ages* 728 (1991).

9 Clapp, *supra* note 3, at 224-26.

10 Op-Ed, *Four Frames on America*, N.Y. Times, July 6, 1991, at A21; N.Y. Times, July 20, 1991, at A18 (Letters).

11 *See, e.g.*, 135 Cong. Rec. S 5595 (daily ed. May 18, 1989) ("Senator [D'Amato] is absolutely correct in his indignation and in his description of the blasphemy of the so-called artwork. I do not know Mr. Andres Serrano, and I hope never to meet him. Because he is not an artist, he is a jerk."); *id.* at S 12968 (Oct. 7, 1989) (criticizing the conference bill on the 1990 appropriations bill for its failure "to get tough on the NEA for funding trash like Mr. [Robert] Mapplethorpe's and Mr. Serrano's"). One of the immediate results of Senator Helms's attack was the legislation at issue here.

Whether a particular work of art will offend Americans' beliefs or values often depends on the perspective of the viewer. This is well illustrated by David Hammons's "How Ya Like Me Now" (1988) (App. 14a), which depicts a white, blue-eyed Jesse Jackson. The work outraged many young African-Americans, who saw it as insulting to Mr. Jackson, unaware that the African-American artist was using color to comment on how race influences political (and other) judgments.[12] Similarly, viewers offended by Robert Colescott's highly stereotypical images of African-Americans in "George Washington Carver Crossing the Delaware: Page From American History" (1975) (App. 15a) might react differently once they realize that Colescott, an African-American, seeks to attack such stereotypes with his figures.[13]

Differing political viewpoints can also influence the perception of whether a particular artistic work collides with "the beliefs and values of the American public." In the age of McCarthyism in the United States, artists, especially those of foreign origin, were often identified with communism. In 1949, Congressman George A. Dondero delivered the following lines in a speech before the House of Representatives:

> . . . art is considered a weapon of communism, and the Communist doctrinaire names the artist as a soldier of the revolution. It is a weapon in the hands of a soldier in the revolution against our form of government, and against any government or system other than communism. . . .

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12 Roxanne Roberts, *Jackson: Not Insulted by Painting; Says Destruction of Portrait Reflects Hidden Anger*, The Washington Post, Dec. 4, 1989, at B1; *Hammering the Body Politic; Blacks Wreck a Portrait of a Blond, White Jesse Jackson*, Time, Dec. 18, 1989, at 79.

13 *See* John Russell, *Turbulent Restatements from Robert Colescott*, N.Y. Times, Mar. 3, 1989, at C32; Paul Richard, *Robert Colescott's Perspectives on Black and White*, The Washington Post, January 20, 1988, at C1.

> What are these isms that are the very foundation of so-called modern art? . . . I call the roll of infamy without claim that my list is all-inclusive: dadaism, futurism, constructionism, suprematism, cubism, expressionism, surrealism, and abstractionism. All of these isms are of foreign origin, and truly should have no place in American art. . . . Picasso, who is also a dadaist, an abstractionist, or a surrealist, as unstable fancy dictates, is the hero of all the crackpots in so-called modern art.[14]

Most of the artists that Senator Dondero believed were conspiring to overthrow democracy in America (such as Marcel Duchamp and Fernand Léger), today are accepted, almost universally, as important contributors in the development of American art.

A more extreme example of artistic expression colliding with the reigning political regime was the Third Reich's program to brand as "degenerate" much of the modern art that flourished in Germany after World War I in order to clarify for the German public "exactly what type of modern art was unacceptable to the Reich, and thus 'un-German.' "[15] Confiscating art from museums all over Germany, the Nazis installed over 600 works in an exhibition of so-called "Degenerate Art." To discredit the works further for the popular audience, many of the works were affixed with a red sticker stating "Paid for by the taxes of the German working people."[16] The condemnation of contemporary art and the threat of eliminating public funding for the arts is still part of the agenda of some right-wing European politicians including Jean-Marie Le Pen in France and Jorg Haiden in Austria.[17]

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14 95 Cong. Rec. H 11584 (Aug. 16, 1949).

15 Stephanie Baron (ed.), *"Degenerate Art": The Fate of the Avant-Garde in Nazi Germany* 9-23, 45-46, 89 (1991).

16 *Id.*

17 *See* David Zane Mairowitz, *Fascism a la Mode: in France, the Far Right Presses for National Purity*, Harper's Magazine, Oct., 1997,

These examples demonstrate that the public's opinions as to whether any particular art work is "decent" will be as diverse as their beliefs and values in general. As should be apparent, there is no way to determine the content of "general standards of decency" and the "respect for the diverse beliefs and values of the American public." Because Section 954(d)(1) implicates protected speech under the First Amendment, those standards need to be defined with specificity. They are not. The statute, therefore, is unconstitutionally vague.

C. The "Decency" And "Respect" Provisions Cause The Harm That The Vagueness Doctrine Attempts To Avoid

The harm of the unconstitutionally vague "decency" and "respect" provisions is that authority to administer this vague statute is placed, with no form of review, in the panelists, Council, and ultimately, in one person, NEA's Chairperson, with knowledge that members of Congress and others with particular political viewpoints will be looking over their shoulders. This sort of unguided discretion fosters precisely the kind of invidious discrimination among viewpoints that is intended to be avoided by the Due Process Clause's requirement that a statute be reasonably clear. As Justice Clark pointed out, concurring in *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 701 (1959), with this sort of statutory guideline

> [t]he only limits on the censor's discretion is his understanding of what is included in the term "desirable, acceptable or proper." This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.

at 59; Sharon Waxman, *Artists Put on Brakes at France's Right Turn; Some Urge Boycott in National Front Towns*, The Washington Post, June 22, 1995, at C1; Ian Traynor, *Austrian Far Right Turns the Arts into Theatre of War*, The Guardian (London), Dec. 14, 1995, at 15.

Accord, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423-24 n.19 (1993).

Moreover, the Chairperson is not required to give reason for disapproving a grant, so that there is no record that can be reviewed if the Chairperson abuses his or her authority and rejects an application because of its political or ideological viewpoint. Thus, the sole, unsupervised and unreviewable authority to decide whether a grant application comports with "general standards of decency" and is respectful of the American "beliefs and values" amounts to bestowing on the Chairperson a power of censorship, a power that this Court has said "should not be easily inferred." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946).[18]

Unjustified rejection of artistic expression because of its viewpoint is just one side of the harm flowing from this unconstitutionally vague statute. The other is the self-censoring effect that such a limitless standard will have on the artists and arts organizations who seek NEA grants to support their work and exhibitions. Artists producing works worthy of funding will be discouraged from applying for an NEA grant, fearing that any subject too unconventional will not overcome the hurdle of Section 954(d)(1)'s "decency" and "respect" provisions. A second level of self-censorship comes from arts institutions that decline to display works out of fear of being rejected for future funding under some interpretation of the "decency" and "respect" provisions. Section 954(d)(1) thus has the doubly undesirable effect of forcing artists and arts organizations to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked" (*Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotes omitted)), and stifling the creation of the best and most inno-

[18] In *Hannegan*, this Court held that to uphold the Postmaster General's revocation of Esquire Magazine's second-class postal permit on the ground that, although not obscene, material in the magazine was "indecent, vulgar and risque" "would grant the Postmaster General a power of censorship [which is] abhorrent to our traditions. . . ." 327 U.S. at 149, 151.

vative work that artists are capable of creating—just what the NEA was originally established to promote.

II

ARTISTIC "EXCELLENCE" AND "MERIT" ARE NOT UNCONSTITUTIONALLY VAGUE

In support of its contention that Section 954(d)(1) is not vague, the NEA has adopted an argument advanced by Judge Kleinfeld in his dissent from the court of appeals panel decision (Pet. App. 38a-40a) and repeated by Judge O'Scannlain in his dissent from the denial of the petition for rehearing *en banc* (Pet. App. 95a). The NEA claims that if "general standards of decency" and "respect for the diverse beliefs and values of the American public" are impermissibly vague, then so too are "artistic excellence" and "artistic merit." Pet. Br. 48.

The court of appeals rejected Judge Kleinfeld's argument as irrelevant because the meaning of those terms had not been challenged by respondents. Pet. App. 18a n.18. However, the court of appeals noted that there were obvious differences between the "decency" and "respect" provisions and "artistic excellence" and "artistic merit," including the fact that the NEA decision-makers are knowledgeable about the arts, but have no particular expertise in determining what is "decent" or whether the American public shares any particular beliefs or values on a given subject. *Id.*

The NEA's argument that "artistic excellence" and "artistic merit" are unconstitutionally vague suggests that it is impossible to answer the questions "what is art?" and "how do we tell the difference between good art and bad art?" The *amici curiae* believe that, although there may be no absolutes when it comes to art, there are, in fact, standards and tools which can be used to answer these questions.[19]

[19] Some philosophers of art and aesthetics, for example, have recognized that visual art is the marriage of (1) content and (2) a mode of visual presentation. *See, e.g.*, G.W.F. Hegel, *Introductory Lectures on Aesthetics* 13 (Michael Inwood ed. & Bernard Bosanquet trans., Penguin Books 1993) ("What is now aroused in us by works of art is over and above our immediate enjoyment, and together with it, our judgment; inasmuch as we subject the content and the means of representation of the work of art and the suitability and the unsuitability of the two to our intellectual consideration."); Arthur C. Danto, *After the End of Art: Contemporary Art and the Pale of History* 81-98 (1997) (applying Hegel's paradigm to contemporary art criticism).

In his dissenting opinion, Judge Kleinfeld tries to suggest that the process of judging art is wholly elusive. Pet. App. 39a. He relies for this startling proposition on a passage in the 1962 first edition of "History of Art," the well known textbook by H.W. Janson.[20] A closer examination, however, reveals that Janson does not support Judge Kleinfeld's assertion. Although Janson admits that absolute definitions cannot be reached, the Introduction to his first edition discusses at least two factors which are necessary to distinguish art from mere craft: originality and creativity.[21] By the 1997 fifth edition of the Janson text, the Introduction has been expanded to include discussions of creativity, imagination, originality, technique, meaning and style, self-expression, and taste.[22] That Introduction continues by listing certain visual elements that should be analyzed when looking at art: line, color, light, composition, form and space. Contrary to Judge Kleinfeld's assertion that there are no standards for evaluating art, the latest edition of Janson takes a far less absolutist view: "If definitive conclusions are impossible, there is still a good deal that can be said."[23] Indeed, Janson's "History of Art" is

[20] Pet. App. 39a. The exact passage is: "But if we must give up any hope of a trustworthy rating scale for artistic quality, can we not at least expect to find a reliable, objective way to tell art from non-art? Unfortunately, even this rather more modest goal proves so difficult as to be almost beyond our powers."

[21] H.W. Janson, *History of Art* 9-17 (1st ed. 1962).

[22] Janson, *supra* note 6, at 16-25.

[23] *Id.* at 16.

a 1000-page tome of judgments about which objects are the visual artistic masterpieces of the Western World.

The factors listed in Janson's most recent Introduction demonstrate that there are, in fact, standards which may be used to determine artistic excellence and merit. Furthermore, and central to this case, whatever artistic "excellence" and "merit" mean, their definition cannot and do not include "general standards of decency" and the "respect for the diverse beliefs and values of the American public."

A. There Are Established Standards Of "Artistic Excellence" And "Artistic Merit"

Since the advent of art history as a discipline, there have been established standards for determining artistic excellence. However, the answers to the questions "what is art?" and "how can we tell the difference between good art and bad art?" have depended on where and when they are asked.

In ancient Greece and Rome, writers mentioned objects that today are classified as art, such as paintings and sculptures, but they were not discussed as works of art. Instead, these mentions appeared in texts on other subjects and described only how the objects were made, their size, their cost, the artists who made them, how lifelike they were, whether they were the first of their kind, and the extent to which they embodied either natural or ideal beauty.[24] Cicero (106-44 B.C.), Pliny (23-79 A.D.) and Quintillian (30-100 A.D.), for example, described the development of sculpture beginning from the 5th century B.C., moving from crude early representations to a style of perfect naturalism (the way things really look) in the 4th century B.C. (evidenced by the sculptural work of Phidias on the Parthenon), to idealism (the way things ought to look in a perfect

[24] Eric Fernie, "A History of Methods," *Art History and Its Methods: A Critical Anthology* 10 (1995). *See* Pliny the Elder, *Natural History*, excerpts *reprinted in* Janson, *supra* note 6, at 213-14.

world).[25] These ways of writing about art objects continued, for the most part without change, from antiquity, throughout the first millennium and up to the Middle Ages.[26]

The study of art became a subject in its own right in the 16th century with the publication of Giorgio Vasari's *Lives of Artists* in 1550 in Florence.[27] The *Lives* is a series of biographies which treat the Renaissance artist as genius, set apart from ordinary man by the grace of God. The *Lives* featured artists such as Leonardo da Vinci, Michelangelo and Raphael; and their achievements in painting, sculpture and architecture were compared to the classics of ancient Greece and Rome. Unlike prior historians, Vasari did not merely describe art works; instead, he made judgments about the quality of art works for the purposes of attribution and to decide which artists belonged among the most accomplished of the Renaissance.[28] Vasari assessed artistic quality on the degree of naturalism or illusion attained and considered ideal beauty to be the selection and combination of the most beautiful parts of nature. He encouraged connoissuership and the close study and analysis of works of art, leading to the classification of styles of individual artists and schools, and tracing the influences among them.[29]

Following the peak of the Renaissance style (generally considered from 1500 to 1525), the history of Western art is best characterized by a series of stylistic innovations and reactionary movements, labeled by historians with such terms as the Baroque, Rococo, Neo-Classical and Romantic periods. Not surprisingly, these movements in painting and sculpture

[25] Fernie, *supra* note 24, at 10.

[26] *Id.*

[27] 1 Giorgio Vasari, *Lives of the Artists* (George Bull trans., Penguin Books 1965). *See* Fernie, *supra* note 24, at 22-28.

[28] Vasari, *supra* note 27, at 83-84 ("I have endeavored not only to record what the artists have done but also to distinguish between the good, the better, and the best . . .").

[29] *See* Fernie, *supra* note 24, at 22-28; Janson, *supra* note 6, at 452.

had companion periods in music and literature. At first, each of these movements presented, in some way, a challenge to the then-established style of art. They subsequently became popular and, therefore, established in their own right, and, eventually, declined as they were challenged by a new style or the revival of an old style.

The Renaissance "classical" style of Leonardo da Vinci, Michelangelo and Raphael can best be characterized by clarity, balance and restraint. By the mid to late 16th century, many artists began moving away from this classical style and developed a style that had more of a mannered elegance.[30] This break led to the rise and dominance in the 17th century of the Baroque artists (such as Caravaggio and Bernini in Italy, and Rubens, Rembrandt and Vermeer in Northern Europe), whose painting and sculpture were generally characterized by great drama or elaborate ornamentation.

Despite the work of these Italian and Northern artists, it was France that became the most culturally (and militarily) powerful European country in the 17th century (a reign that, in the visual arts, would continue until the middle of the 20th century). In response to the dramatic works of the Baroque painters, many French artists began once again to champion the classical style. The Frenchman Nicholas Poussin (1593-1665) was the protagonist of the classical style in the 17th century. He wrote that the painter must:

> make every effort to avoid getting lost in minute detail, so as not to detract from the dignity of the story. He should describe the magnificent and great details with a bold brush and disregard anything that is vulgar and of little substance. Thus the painter should not only be skilled in formulating his subject matter, but wise enough to know it well and to choose something

[30] The "Mannerist" style is represented by the Italian painters Pontormo (1494-1556), Parmigianino (1503-1540), and Bronzino (1503-1572). *See generally* Janson, *supra* note 6, at 482-496.

> that lends itself naturally to embellishment and perfection.[31]

Following Poussin's death, the French government, under Louis XIV (crowned in 1661), adopted classicism as the officially approved style in order to glorify the monarchy.[32] Louis XIV also reconstituted the Royal Academy of Painting and Sculpture in Paris to inculcate this style. The Academy even devised a method for grading artists of the past and present in such categories as drawing, expression and proportion. (The ancient Greeks and Romans received the highest grades, followed by Raphael and Poussin. The Venetians, such as Veronese, and the Dutch received the lowest marks.)[33]

In England, Sir Joshua Reynolds, the president of the Royal Academy in London, also professed the Academy style. In his famous *Discourses*, Reynolds developed a hierarchy for artistic merit in painting based on subject matter and style that was similar to the rules of the French Academy.[34] Paintings of subjects from Greek and Roman mythology and history and the Bible were considered to be more dignified than paintings of landscapes, which, in turn, were considered more advanced and noble than portraits and still life paintings.[35]

Following Louis XIV's death in 1715, the French nobility were no longer tethered to the court at Versailles, and the monarchy loosened its grip on the French Academy. In this freer society, artistic taste swung in the other direction toward the highly fashionable style of the Rococo painters such as Antoine Watteau, Francois Boucher and Jean-Honoré Frago-

[31] Nicholas Poussin, from an undated manuscript, *reprinted in* Janson, *supra* note 6, at 641.

[32] *See* Janson, *supra* note 6, at 600-01.

[33] *Id.* at 601.

[34] Sir Joshua Reynolds, *Discourses on Art*, ed. Robert R. Wark, 57-73 (1975).

[35] *Id.* Given Reynolds's theories, it is surprising that he was, in fact, primarily a painter of portraits.

nard. Instead of choosing noble and dignified subjects from Greek and Roman mythology or the Bible, these painters showed scenes of elegant society, generally in parklike settings, and comedies.[36]

The Rococo period lasted only a short time, however, as the politics of the French Revolution and Empire greatly influenced the favored artists of the late 18th and early 19th century. A revival of classical antiquity (the "Neo-Classical" period) dominated the late 18th century (*e.g.*, the painting of Jacques-Louis David, a hero of the French Revolution), and was linked to the Enlightenment thinkers in France, England and Germany. Then, around 1800, the Romantic artists (as well as writers and musicians) began to flourish.[37] These artists were more linked to each other in thought (generally a "return to Nature") than in style, which was really a revival of many different styles (*e.g.* the "Neo-Rococo" of Francisco Goya in Spain, the "Neo-Baroque" of Théodore Géricault and Eugène Delacroix in France, the "Neo-Classicism" of J.A.D. Ingres also in France, and the landscape painters of France and England including Camille Corot, Jean-Francois-Millet, John Constable and J.M.W. Turner).

Toward the end of the 19th century, at the dawn of the Industrial Age, a revolutionary development in painting took place in France. In 1863 Édouard Manet (1832-1883) shocked the Paris art world with his "Déjeuner sur l'herbe" (App. 4a). This painting particularly offended contemporary morality by juxtaposing a nude woman with two men in contemporary dress in an outdoor setting, without a title that invoked any "higher" meaning.[38] More importantly, however, the painting

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36 *See generally* Janson, *supra* note 6, at 610-629.

37 *See generally*, Janson, *supra* note 6, at 672-706; Robert Rosenblum and H.W. Janson, *19th Century Art* 114-218 (1984).

38 *See* Janson, *supra* note 6, at 720; *see also* T.J. Clark, *The Painting of Modern Life: Paris in the Art of Manet and His Followers* 94-95 (1984).

is among the first to use pictorial elements purely for aesthetic effect, thereby demonstrating that painting does not have to be a window to the world. Manet took this concept even further by painting his later pictures with very little modeling, depth or shadows, thus rejecting the notion that a painting must transform a flat surface into a pictorial space.[39]

Manet's style of painting was adopted and advanced by Claude Monet and the Impressionist painters, including Camille Pissarro, Auguste Renoir and Edgar Degas.[40] When these artists were refused permission to exhibit at the Salon of Paris, they were forced to organize an exhibition of their own works in the spring of 1874.[41] Their paintings depicted outdoor, "slice-of-life" scenes using innovative networks of color and seemingly spontaneous brush strokes. Painters such as Paul Cézanne carried Impressionism even further by painting still-life subjects (bowls of apples, for instance) using brush strokes that resulted in highly textured canvasses and perspectives that could not exist in the real world.[42]

Just as there were standards for judging art in the 16th through 19th centuries, there are also standards for judging 20th century art. However, judging artistic excellence in the 20th century is more complex than in the past because of the tremendous variety of artistic styles and movements.[43] Not only have new and previously unimagined styles of painting and sculpture emerged in the 20th century, entirely new *forms* of art have been developed. This tradition was begun around 1913 when Marcel Duchamp began to display ordinary objects such as bicycle wheels, shovels and, in one case, a

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39 Rosenblum and Janson, *supra* note 37, at 278-295.

40 *See generally id.* at 331-53.

41 *Id.* at 331-54.

42 *See generally id.* at 384-93.

43 As various styles and movements have developed, so too have the number of "isms" that historians use to label them. Examples include: Cubism (*e.g.*, Picasso and Braque), Futurism (*e.g.*, Umberto Boccioni),

urinal, as "ready made" sculptures.[44] Duchamp's intent in presenting such objects, without altering them at all, was to give them different meaning by placing them in a new context, an art gallery, in order to challenge the idea that aesthetics were necessary for art and to expand the notion of the artist as creator. Duchamp's views were carried forward in the 1960s by the Pop Artists (*e.g.* Claes Oldenburg, Roy Lichtenstein and Andy Warhol) who displayed ordinary objects as art works to expose art as a commodity and to comment on the new commercial nature of the art world.[45] Since Duchamp's time, unconventional objects such as air, light, sound, words, live persons, animals and food have all been used as components of art works. In addition, photography, video, installations, performances ("happenings"), environmental constructions ("earth art"), assemblages, and mere ideas have become legitimate art forms.

These are fascinating, exciting and challenging times for artists, art historians and critics. Artists are choosing new and controversial subjects for their art as well as presenting new forms and technologies to embody those subjects. It is a time when the audience may have just as much responsibility for the understanding of an art work as the artist has in conveying its meaning; a time when sensory experience, traditionally thought to be paramount in the appreciation of the visual arts, may be subordinate to thought; a time when art does not even require a tangible object.[46]

Surrealism (*e.g.*, Renè Magritte, Joan Miró, and Salvador Dalí), Dadaism (*e.g.*, Marcel Duchamp), Suprematism (*e.g.*, Kazimir Malevich), Expressionism (*e.g.*, Franz Marc, Max Ernst, and Egon Schiele), Abstract Expressionism (*e.g.*, Jackson Pollock and Willem de Kooning) and Minimalism (*e.g.*, Sol LeWitt, Donald Judd and Ellsworth Kelly).

[44] *See* H.H. Arnason, *History of Modern Art* 227-230 (3d. ed. 1986).

[45] *See generally, id.* at 452-470; Janson, *supra* note 6, at 831-834; Michael Archer, *Art Since 1960* 9-25 (1997).

[46] Because art created in the last twenty-five years has gone so far beyond traditional notions of painting and sculpture, some art critics have argued that the history of art ended in the 1960s and that art created since that time is "beyond the pale of history." *See* Arthur C. Danto, *After the End of Art: Contemporary Art and the Pale of History* (1997); Hans Belting, *The End of the History of Art* (Christopher S. Wood trans. 1987).

Despite the changed nature of art in the 20th century, there remain standards for determining artistic excellence. Creativity, imagination, originality, technique, meaning, style, and self-expression are all still relevant. However, it requires skilled, knowledgeable and fair evaluators to apply these standards.

B. "Artistic Excellence" And "Artistic Merit" Must Be Evaluated Within The Particular Context Of The NEA Program

For the purposes of the void-for-vagueness doctrine of the Fifth Amendment, statutory language must be interpreted in the "particular context" within which the legislation was enacted. *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). The "particular context" within which "artistic excellence" and "artistic merit," as used in Section 954(d)(1), must be evaluated for vagueness purposes is the NEA grant program. It is the NEA decision-makers, after all, who must apply those standards. Because these decision-makers are knowledgeable about the arts (indeed, many are experts in their fields), "artistic excellence" and "artistic merit" are concepts with which they are extremely familiar.

In order to arrive at a meaningful evaluation of art, especially 20th century art, the evaluator must have knowledge about the objects at which he or she is looking. The more knowledge, the better. Important information to the evaluator may include the identity of the artist, his or her background, knowledge of prior works done by that artist, and the locale in which the work was created. In addition, he or she must be able to place the object within its art historical context. Is the work influenced by a prior artist? Are there literary or musi-

cal influences? Is the work making a statement about the history of art, as Duchamp's works were? Finally, and perhaps most importantly, the evaluator must be able to learn about the art work by closely looking at it. The ability to learn about an object by looking can come only with experience.[47] If the judge is a person who has examined hundreds or thousands of the same type of object, the evaluation becomes much more advanced and reliable. For example, an expert in ancient Greek painted ceramic pots could probably, without much controversy, examine two such pots and explain why one has more artistic merit than the other. This same is true, of course, in judging literature, music and performing arts.

Evaluating the art created by one's contemporaries is usually more difficult than evaluating art of the past. The problem is lack of perspective.[48] As with the writing of any history, a certain period of time needs to pass before any particular event can properly be put into context. Despite these

[47] The art critic Clement Greenberg wrote in 1961: "Experience itself—and experience is the only court of appeal in art—has shown that there is both bad and good in abstract art. And it has also been revealed that the good in one kind of art is always, at bottom, more like the good in all other kinds of art than it is like the bad in its own kind." Clement Greenberg, "The Identity of Art," 4 *The Collected Essays and Criticism* 118 (John O'Brian ed. 1993).

[48] For example, as popular as their style is today and as innocuous as their works now seem, the Impressionist painters were at first rejected by critics. In fact, their first exhibition in 1874 was received with outrage and condemnation. The critic Louis Leroy mockingly commented that viewers might have thought their eyeglasses were dirty by looking at all of the specks in one Pissarro painting. Rosenblum and Janson, *supra* note 37, at 334. In 1875, a public scandal arose after an exhibition in London of paintings by J.A.M. Whistler, including the painting "Nocturne in Black and Gold: The Falling Rocket" (App. 16a). The critic John Ruskin accused Whistler of asking "two hundred guineas for flinging a pot of paint in the public's face." *Id.* at 363. Forced to defend his reputation and his belief in the artist's freedom to create beauty by his own standards, Whistler sued Ruskin for libel and won after a trial in which many British artists testified about whether the painting was a legitimate work of art. *Id.*

complexities, there are experts in the various arts who are equipped with the knowledge, skill and experience to make valid evaluations of art works. Congress recognized that it would require the talent of these experts to make the determinations necessary to award NEA funds. The Act requires that funding applications be reviewed by advisory panels composed of artists and "lay individuals who are knowledgeable about the arts." 20 U.S.C. § 959(c)(2). Recommendations of the advisory panels are reviewed by the National Council of the Arts, which is composed of people selected "from among the private citizens of the United States who (A) are widely recognized for their broad knowledge of, or expertise in, or for their profound interest in, the arts and (B) have established records of distinguished service, or achieved eminence, in the arts." 20 U.S.C. § 955(b). In practice, the NEA advisory panels and the National Council are comprised of just such experts, skilled at discerning the best works among those submitted for NEA funding.

Thus, within the "particular context" (*Grayned*, 408 U.S. at 112) of government funding of arts programs, "artistic excellence" and "artistic merit" are not unconstitutionally vague. Although lay people with only passing knowledge of the arts cannot make an informed decision regarding an NEA grant award, these are not the people Congress selected to be the decision-makers for NEA grants. Instead, the NEA peer panelists and the NEA Council members, people with a broad understanding of the history of their particular artistic discipline and knowledgeable in the recent developments in the art or literary world, make the judgments regarding the applicants for NEA funding.[49] They are not well-versed in "standards of decency" and "the diverse beliefs and values of the American public," but they are uniquely qualified to evaluate artistic excellence.

[49] Despite the addition of more lay people to the NEA advisory panels and the addition of members of Congress to the National Council of the Arts, the panels are still made up primarily of experts in the arts.

C. "Artistic Excellence" And "Artistic Merit" Do Not Include "Standards Of Decency" And "Respect For The Diverse Beliefs And Values Of The American Public"

Throughout history, artists have traditionally experimented with what is new and unconventional, and artistic work often compels the viewer to look at the world in new, often troubling, and provocative ways. Given that tradition, a standard for judging artistic merit that focuses upon "general standards of decency"—and implicitly the idea of conformity—is fundamentally antithetical to the making of art. This is especially true in the 20th century when almost every major art movement is a rejection of the perceived established order in the art world or society.

Even if "general standards of decency" and the "beliefs and values of the American public" could be defined with some degree of accuracy, imposing those standards on NEA's selection of works showing artistic excellence and merit would have a devastating effect on the creation of art. Such standards would oblige artists to compromise their creativity and originality in order to conform to the viewpoint of the majority. This result was clearly not intended by Congress when it created the NEA in 1965. The Senate Report on the legislation creating the NEA stated:

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression. . . . [C]onforming for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or thought of expression.[50]

The NEA suggests that "artistic excellence" and "artistic merit" refer only to "technical proficiency," and that the "decency" provision serves to expand those standards. Pet. Br. 42-43. This equation of artistic excellence with technical skill grossly simplifies the definition of artistic merit and ignores entirely the roles of creativity, imagination, originality and meaning in art. For it is the relationship between the mode of representation (the "technical proficiency") and the meaning of a work that raises an object from mere craft to the level of art.[51] By imposing standards that are impossible to define and reducing the universe of possibilities, the "decency" and "respect" provisions necessarily infringe on artists' ability to choose the most effective mode of representation for their art and to give their art work meaning. Far from expanding standards of "artistic excellence" and "artistic merit," the "decency" and "respect" provisions detract from them.

Imagine the results if Americans were polled on their "standards of decency" and their "beliefs and values."[52] Even if a

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50 S. Rep. No. 89-300, at 3-4 (1965).

51 See texts cited at *supra* note 19.

52 The results of such a poll might resemble the results of the poll conducted by the artists Vitaly Komar and Alexander Melamid to create "America's Most Wanted Painting" (App. 17a). *See Painting By Numbers: Komar and Melamid's Scientific Guide to Art*, ed. Joann Wypijewski (1997). Komar and Melamid sought to learn through a scientific study what the American people wanted if they could construct a painting. They polled 1001 persons, asking them what kind of paintings they liked and what features, colors, textures, etc. they wanted to see in painting. The survey showed that Americans' favorite color is blue (44%), and that they wanted "realistic-looking" paintings (60%), dishwasher-sized (67%), wild animals (51%) in their natural setting (89%), both ordinary and famous people, visible brush strokes (53%), blended colors (68%), etc. The artists took the survey results and painted "America's Most Wanted Painting", a landscape with mountains, a lake and blue sky, a posed George Wash-

consensus could be reached (what would the questions be?), the majoritarian view on various topics, if implemented, would chill the creation of art. In order to be eligible for an NEA grant, artists would be compelled to make art works that satisfied some notion of political correctness, instead of, simply, the best art they can create. To the extent that such vague statutory language as the "decency" and "respect" provisions mean anything, they imply a standard of that which is accepted, traditional and orthodox. To use such a benchmark to evaluate art that is intended to provoke viewers and to challenge traditional standards amounts to setting a standard that can never be met. As a standard for receiving NEA grants, this may be a prescription for the death of art funded by the NEA. While some members of Congress may intend that result, they should not be permitted to achieve it under the guise of an unconstitutionally vague statute.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 6, 1998

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ington figure, a hippopotamus, deer frolicking through the lake, and a group of people walking. It is easy to see that very few Americans would actually want "America's Most Wanted Painting." Although its individual aspects may be desirable, the sum of its parts is much less desirable. *Id.*

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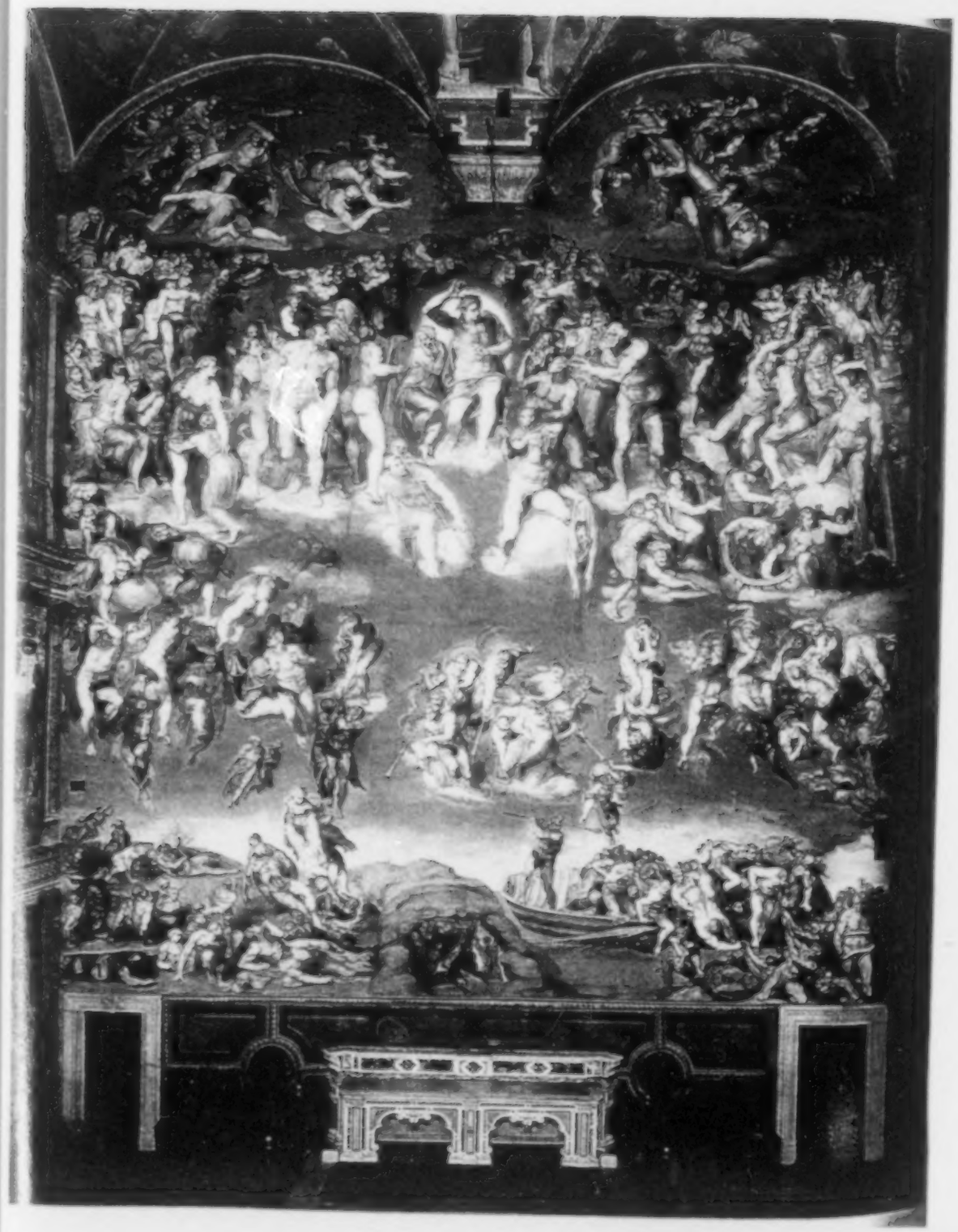

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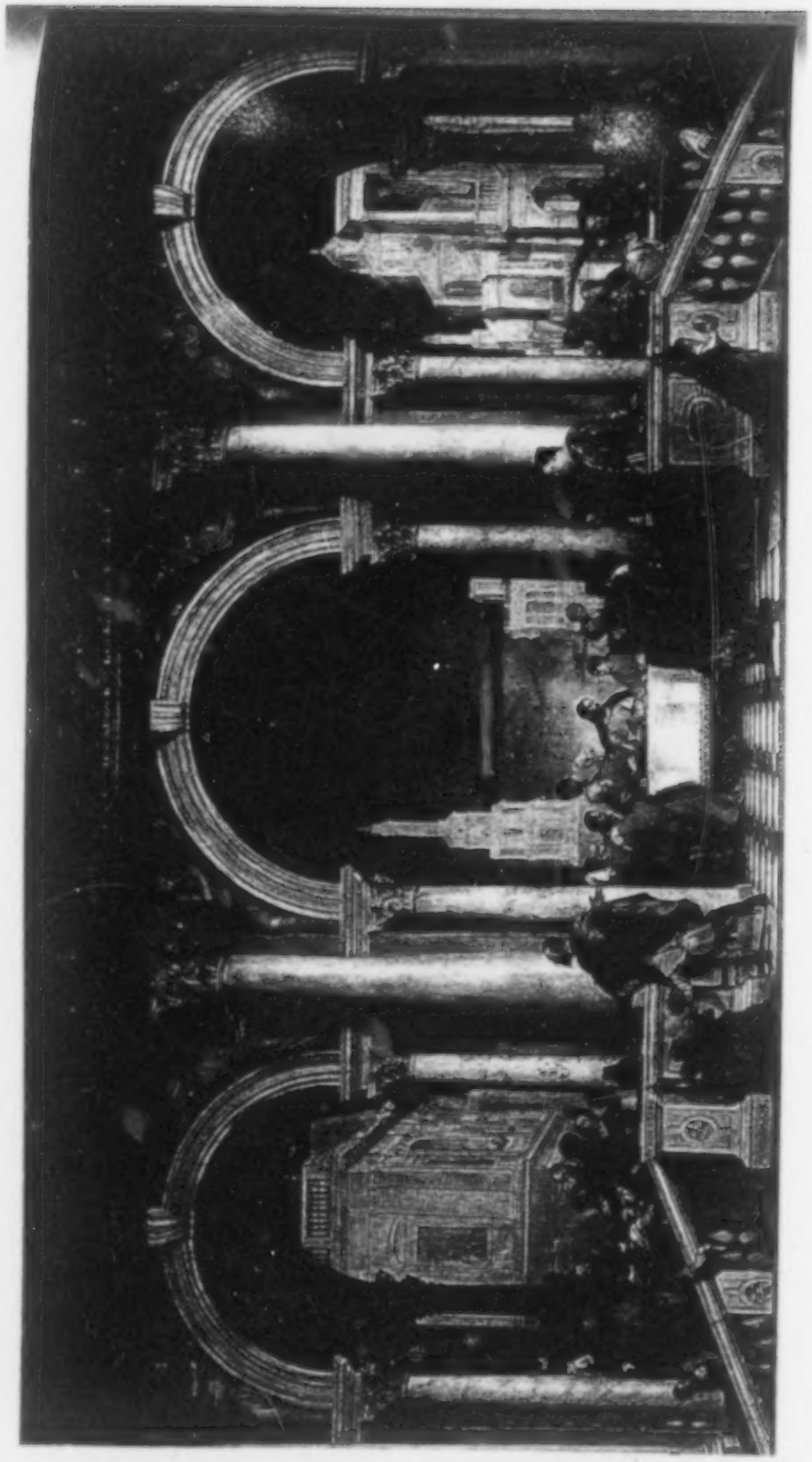

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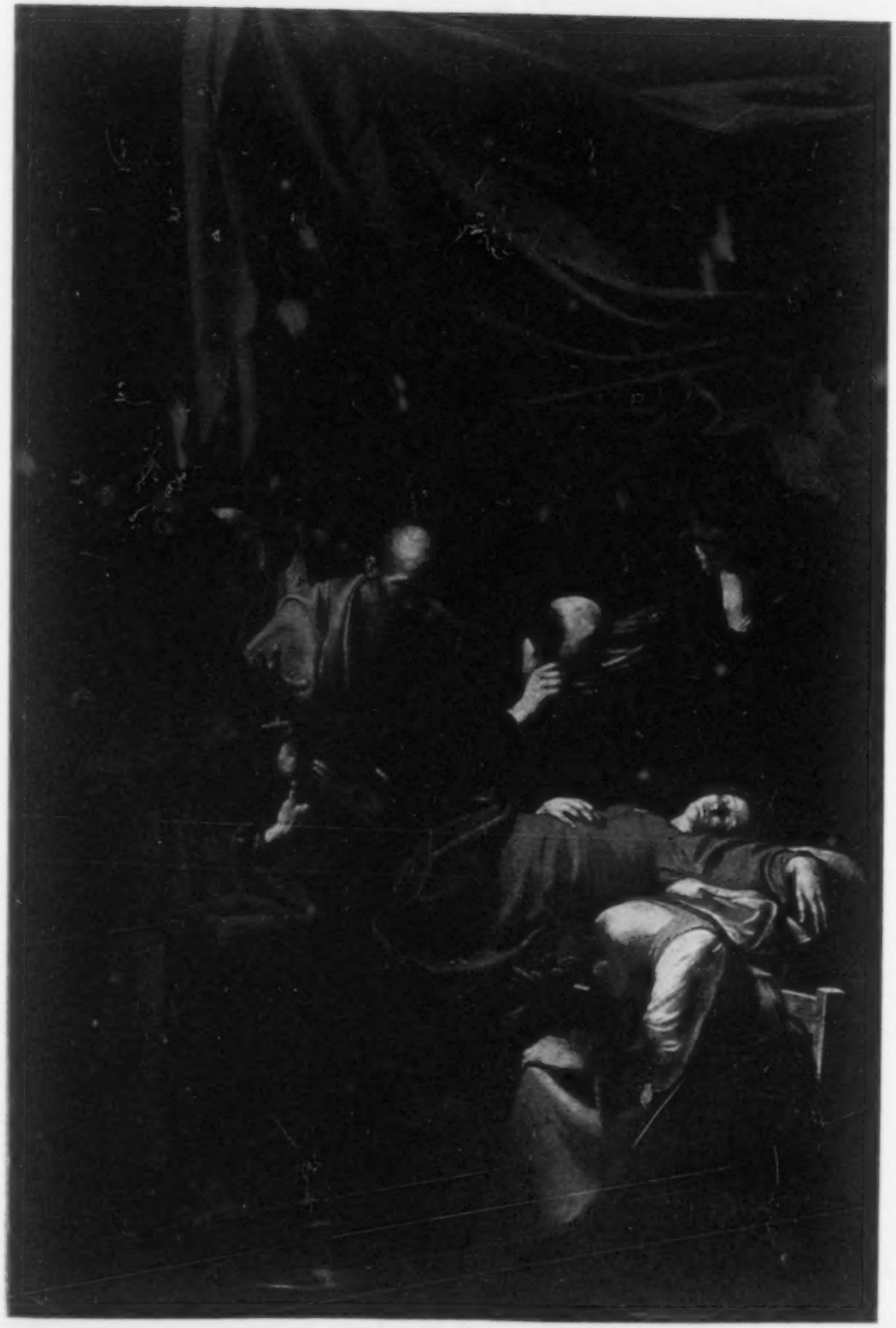

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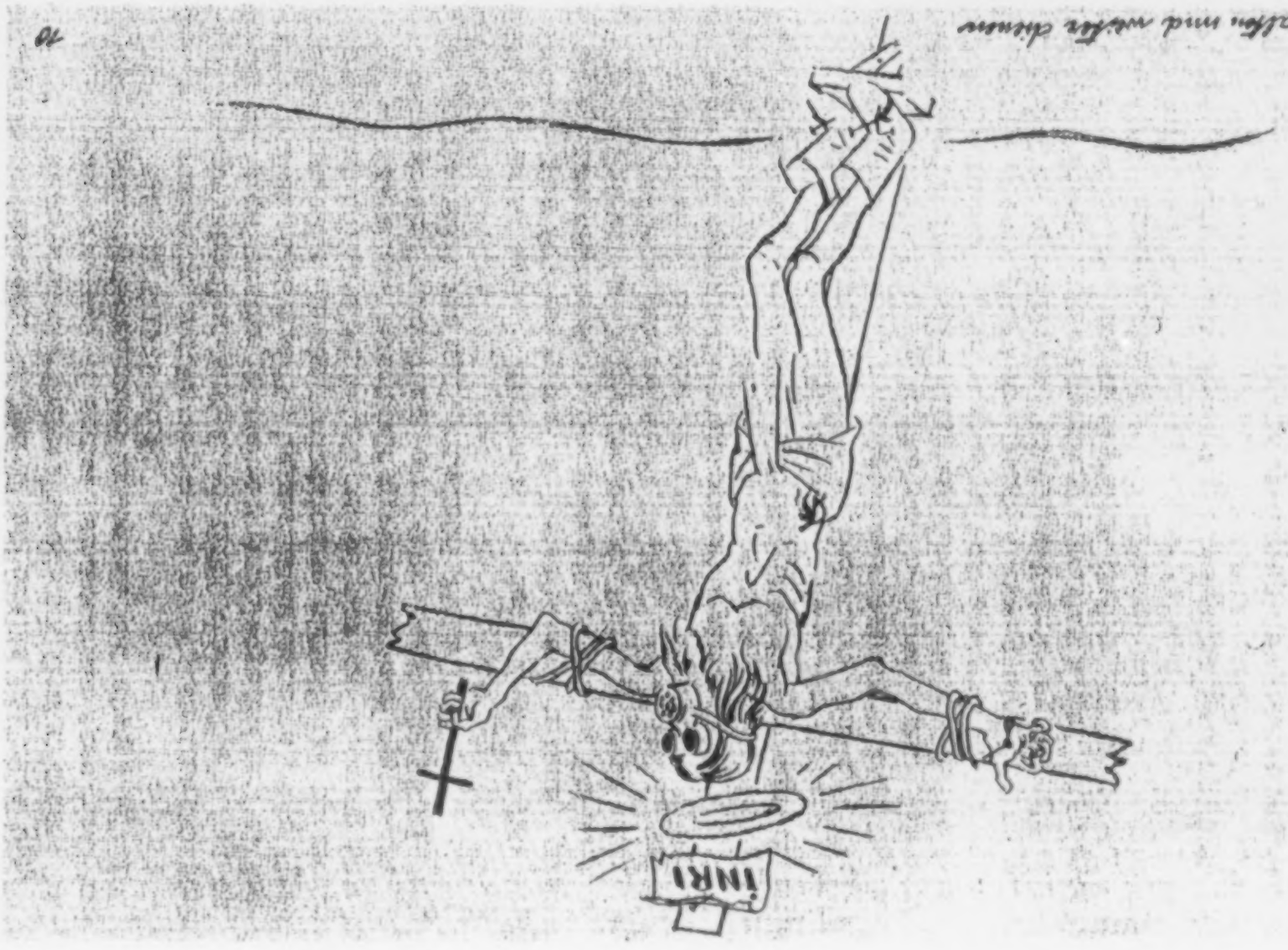

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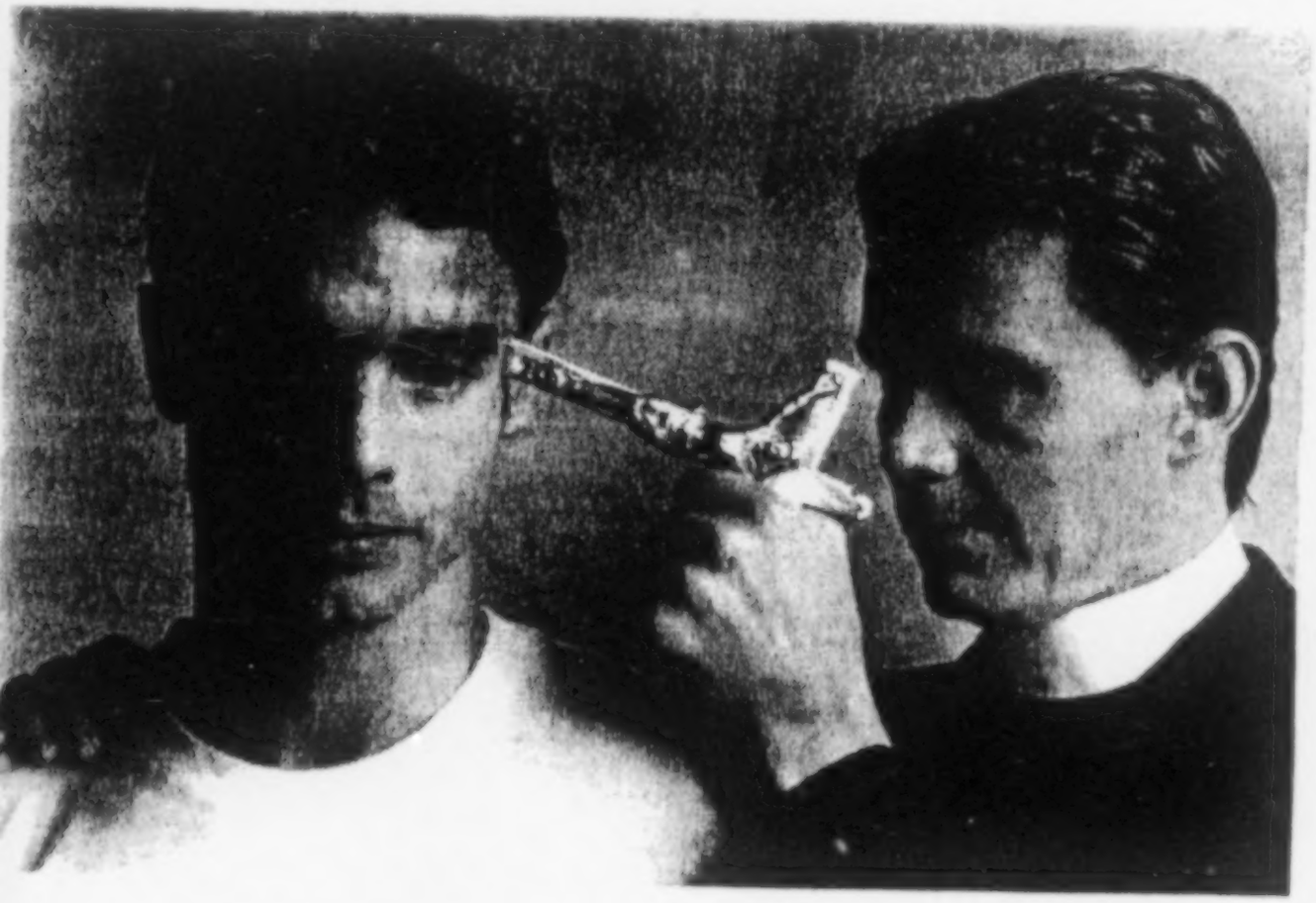
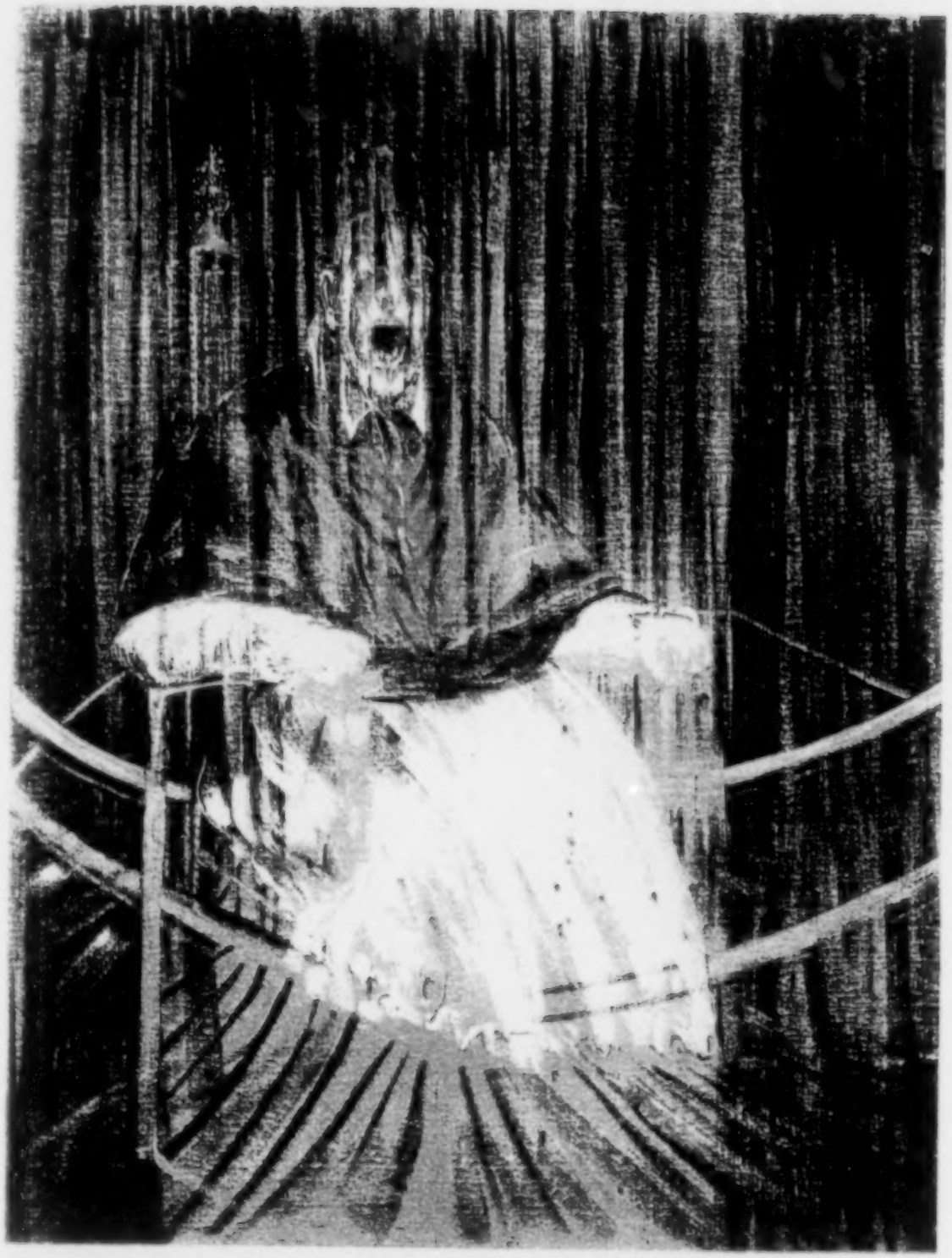


This photo allegory reflects my anger at coercive behavior by some of my fellow citizens. No American has the right to impose his private morality on any other American, yet this is precisely the political agenda of some religious groups.

Millions of women have become victims of attacks on their most painful, private choice of conscience: whether to have an abortion.

Millions of homosexuals and lesbians have become victims of attacks on gay rights legislation, denying them fundamental rights to housing and employment, which heterosexual Americans take for granted.

— Duane Michals



How You LIKE
ME NOW?

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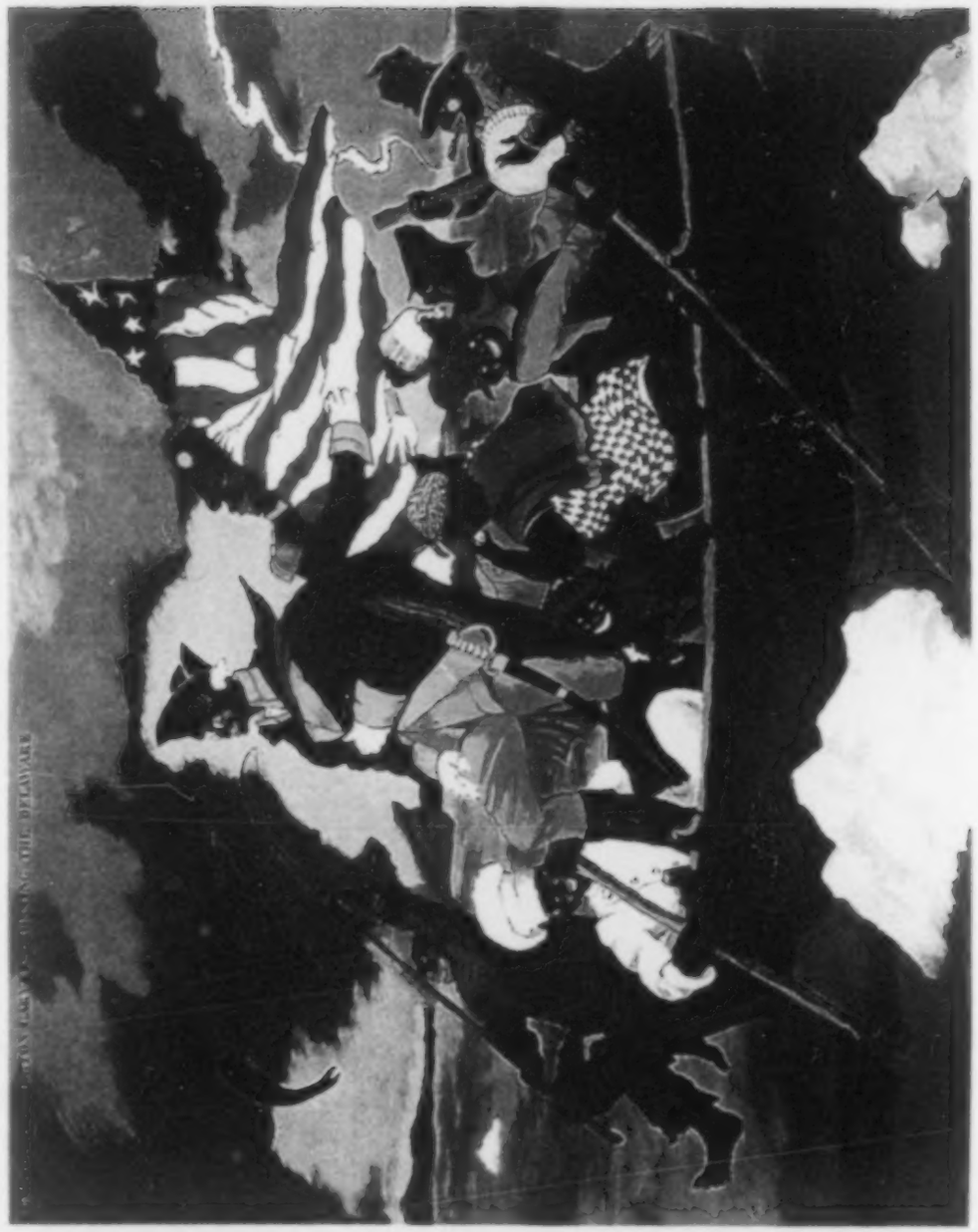

AMICUS CURIAE

BRIEF

MOTION FILED
FEB 6 1998

No. 97-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS,

Petitioners,

v.

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION FOR ARTIST' ORGANIZATIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE FAMILY RESEARCH INSTITUTE OF WISCONSIN IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

Case No. 97-371

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
1997 Term

National Endowment for the Arts; Jane Alexander, in her official capacity as Chairperson of the National Endowment for the Arts,

Petitioners,

v.

Karen Finley; John Fleck; Holly Hughes; Tim Miller; National Association of Artists' Organizations,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Now comes Family Research Institute of Wisconsin (FRI) and seeks leave to file this brief as Amicus Curiae. As grounds therefore, FRI would show that:

1. The Office of the Solicitor General of the United States has granted permission for FRI to file this brief, which letter is made a part of this motion;

2. Counsel for Respondents have denied permission for FRI to file this brief on the ground that FRI's interests are not aligned with theirs, which letter is made part of this motion;

3. FRI's interests are sufficiently aligned with those of Respondents that their denial of permission to bring this brief to the Court's attention ought not bar its filing.

Respondents seek the broadest flow of speech and other expressive conduct consistent with the parameters of the First Amendment. To that end, they challenged part of the NEA's enabling legislation as a content-based restriction on their right to free speech. Both the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit agreed, and struck down the offending provision. Respondents appear before this Court to defend the broadened access to funding made possible by the courts below.

The Family Research Institute of Wisconsin also supports the greatest liberty possible in the free exchange of ideas consistent with the First Amendment. Specifically, FRI joins Respondents in proclaiming the importance of the arts, and the need for them to be free of governmental interference. Presumably, Respondents would join with FRI in decrying any attempt to further free speech issues through coercion. If any arts program is to survive constitutional review, it must fit within the parameters of the First Amendment. The FRI simply seeks to ensure that any governmental involvement does not jeopardize the freedom and liberty that are essential to the flourishing of the arts in a democratic society.

Both FRI and Respondents seek to have the Ninth Circuit's decision upheld by this Court. The fact that FRI advances a different rationale for affirmance does not mean its interests are insufficiently aligned with Respondents to allow filing of the brief. The FRI respectfully requests leave to file this brief.

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Interest of Amicus Curiae

The Family Research Institute of Wisconsin, Inc., is a non-partisan, not-for-profit, pro-family, state legislative research institute. The Institute is dedicated to researching issues of interest to, and which have an impact on, Wisconsin families, and then disseminating that information to institutions and individuals. The Institute's goal is to strengthen and educate Wisconsin families.

The freedoms of speech, religion and the press are of inherent value to Wisconsin's families and, hence to the Family Research Institute. Specifically, when government becomes involved in the choice of ideas to be advanced in the marketplace of ideas with taxpayer funds derived, at least in part, from Wisconsin's families, the Family Research Institute believes it necessary to respectfully offer its views regarding the legal and historical principles underlying the treatment of First Amendment principles as they intersect with individual liberties.

Summary of Argument

Congress, in establishing the National Endowment for the Arts, created a financial forum. Forum analysis as it applies to a fund of money is an emerging field, requiring scrutiny of the source of funds going into the forum, and the objects on which it is spent. Purposes for which Congress may appropriate funds are limited by the characterization of the funds comprising the forum. If the contributions are compelled, Congress may use them only to advance goals germane to the purpose of the Federal Government. To do otherwise would violate the First Amendment's Free Speech Clause by compelling individuals to advance speech or ideas with which they may not agree. If the contributions are voluntary, Congress enjoys a broader latitude in what it may fund without offending the First Amendment.

I. Introduction[1]

In 1965, Congress created the National Endowment for the Arts (hereinafter "NEA") as part of the National Foundation on the Arts and the Humanities.[2] In so doing, it provided the *raison d'etre* of the program, *viz.*, to "transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art."[3] The NEA carries out this mandate by appropriating

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[1] Pursuant to Supreme Court Rule 37.6, counsel states that he has authored this brief in whole, and that the Alliance Defense Fund has made a monetary contribution to its preparation.

[2] 20 U.S.C. section 951 *et. seq*.

[3] 20 U.S.C. section 951(11). As justification for the program, Congress made the following findings:

> (1) The arts and the humanities belong to all the people of the United States.
>
> (2) The encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, are also appropriate matters of concern to the Federal Government.
>
> (3) An advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.
>
> (4) Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.
>
> (5) It is necessary and appropriate for the Federal Government to complement, assist, and add to

programs for the advancement of the humanities and the arts by local, State, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

(6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.

(7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.

(8) The world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit.

(9) Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression.

(10) It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to

taxpayer funds and distributing them to, *inter alia*, individuals for productions, performances, workshops or other related activities.[4] The Chairperson of the NEA, in consultation with the National Arts Council, selects the recipients of this munificence.[5]

Amicus is in entire agreement with Congress' assignment of such great weight and importance to the arts and humanities, and favors the laudable goals expressed in the enabling legislation. However, good intentions notwithstanding, the current method of funding this financial forum and granting disbursements violates the First Amendment's guarantee of the freedom of speech. Amicus respectfully suggests that the Ninth Circuit's decision be upheld, but upon the grounds that form the basis for this brief.

provide financial assistance to its artists and the organizations that support their work.

(11) To fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art.

(12) In order to implement these findings and purposes, it is desirable to establish a National Foundation on the Arts and the Humanities.

20 U.S.C. section 951.

[4] 20 U.S.C. sections 954(c), 960.

[5] *Id.*

II. Taxpayer Funding of the NEA Constitutes Compelled Speech

A. Financial Fora

This Court's opinions have nearly completed a very neat framework within which to analyze free speech issues touching on the creation of, and access to, various fora for the expression of ideas. Forum analysis for free speech cases is not limited to the traditional question of access to buildings, sidewalks or parks. As this Court noted in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*,[6] it is possible to create a forum in a metaphysical sense through a pool of funds, which would implicate the same array of access questions as in a traditional forum. The emerging picture of what may be labeled "financial fora" is that they have two related but distinct aspects. The first treats the means by which the forum was funded, the second addresses how the money is distributed from the forum to its recipients. Such fora could be viewed as a ledger of transactions, tracking the source of income and the purposes for which the income is spent. *Rosenberger* itself provided the definitive accounting guidelines for the expense side of the ledger, holding that potential recipients may not be excluded on the basis of the viewpoint they advocate. It was also *Rosenberger* that identified the unanswered question on the rules for the income side of the financial forum ledger: "Finally, . . . I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees."[7] As a result of the NEA's statutory

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[6] 515 U.S. 819, 830 (1995).

[7] 515 U.S. at 851 (O'Connor, J. concurring).

framework, this question must be resolved in the case at Bar so that the free flow of speech and ideas may continue unimpeded.

B. The NEA is a Financial Forum

Congress has created a financial forum through the appropriations authorized by 20 U.S.C. section 960. The distribution of funds brought into that forum is controlled by the terms of 20 U.S.C. section 954(c), which favors:

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;
>
> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
>
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, education,

understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) projects that enhance managerial and organizational skills and capabilities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

Additionally, "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ."[8]

Amicus notes that the District Court concluded that "government funding of the arts is subject to the constraints of the First Amendment"[9] Respondents are troubled by the content restriction they see in the decency clause. In truth, though, this is of a kind with the standards enumerated in section 954(c) -- each mandates decisions based on the content and viewpoints of the material the applicants seek to have

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[8] 20 U.S.C. section 954(d)(1).

[9] *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1475 (C.D. Cal. 1992).

funded.[10] The infirmity of the decency clause is not that it, as opposed to the other standards, impermissibly impinges on the First Amendment, but rather that such restrictions are inconsistent with the method by which the financial forum is funded and the entity creating the forum, thereby contravening the strictures of the First Amendment.

C. Correlation Between how a Financial Forum is Funded and its Permissible Disbursements

Financial fora are created either through voluntary donations or compelled contributions. The method by which they are funded dictates what may be done with the money so received. For example, in *Abood v. Detroit Bd. of Ed.*,[11] this Court addressed a legislatively mandated "agency shop" arrangement for local government employees. Whether a member of the union or not, employees were required to contribute equal amounts, some part of which was used to advocate ideas and positions not directly attributable to the core function of the union. It was concluded that to the extent contributions were compelled, the union was prohibited from using the money for any purpose not directly germane to the purpose of a labor union. On the other hand, so long as the contributions were voluntary, the union was free to put that money to whatever use it desired. Similarly, lawyers in an integrated bar may successfully preclude the State Bar from using part of the mandatory dues to advocate legislation and goals not related to the effective governance of the member

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[10] *See Finley v. National Endowment for the Arts*, 100 F.3d 671, 688 (1996) (Kleinfeld, J. dissenting) ("artistic merit" and "artistic excellence" are content-based judgments).

[11] 431 U.S. 209 (1977).

attorneys.[12] If the member lawyer does not object, there is no proscription found against such advocacy.

In a case with aspects similar to the one at Bar, this Court addressed the public financing of presidential elections.[13] Unquestionably, such financing implicates the very heart of the Free Speech Clause -- political speech and elections. Funds from general revenue were appropriated to be provided to political parties, nominating conventions, and candidates willing to abide by the restrictions of the financing scheme. The program survived a First Amendment challenge because this Court found that it furthered, rather than abridged, "pertinent First Amendment values."[14] However, one of the key provisions of the program limited grants to the parties, conventions and candidates to the amount collected through the "check-off" option on taxpayers' income tax returns. Thus, the financial forum created by Subtitle H of the Internal Revenue Code consisted of funds voluntarily provided. Therefore, Congress was free to implement a full panoply of regulations respecting who the recipients would be and the terms upon which grants would be made without offending the First Amendment.

In *Rust v. Sullivan*,[15] this Court considered whether the First Amendment was transgressed when funds were appropriated from the general revenue to fund a family planning program. Part of the regulations prohibited any

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[12] *Keller v. State Bar of California*, 496 U.S. 1 (1990).

[13] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[14] *Id.* at 92.

[15] 500 U.S. 173 (1991).

recipient of Title X funding from encouraging patients to consider abortion as an alternative to carrying the child until birth. It was concluded that Congress, when pursuing an otherwise legitimate purpose, may condition the grant of funds on complying with the terms of the grant, even when such terms included a content-based ban on speech.[16] In funding a program to accomplish a particular goal, it is not Constitutionally required to fund a program attempting to achieve the opposite result. Contextually understood, then, the impact on speech was merely incidental to Congressional pursuance of a goal germane to its authority.

The federal government's power to appropriate from the public fisc has been construed expansively beginning with this Court's decision in *U.S. v. Butler*,[17] in which it was concluded that public funds need not be spent to advance any particular object enumerated in the Constitution, and is limited only by the mandate that the purpose for the expenditure fit within the rubric of "the general welfare."[18] However, the expenditure must also submit to other provisions of the Constitution. Thus, this Court has consistently held that direct subsidies to sectarian activities violates the Establishment Clause of the First Amendment at its most fundamental level.[19]

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[16] 500 U.S. at 193-94.

[17] 297 U.S. 1 (1936).

[18] *Id.* at 65-66.

[19] *See Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947) (The Establishment Clause means, at a minimum, that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (The "[Establishment] Clause does

This does not mean, though, that government trespasses on the First Amendment when governmental resources are used by individuals or organizations of faith. Thus, for example, outside organizations with a faith-based presentation of issues may have equal access to school buildings during non-instructional hours,[20] and school districts must make school facilities available to faith-based student organizations on the same terms as other student organizations.[21] As long as the resources were not created for the express purpose of advancing religion, there is no Constitutional harm in allowing equal access to all members of society. Nor is there a violation when the incidental effect of governmental expenditures assists such

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absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Committee for Public Ed. v. Nyquist*, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); *id.*, at 772 (Primary evil against which the Establishment Clause protects is the sponsorship and active or financial involvement of the government in things religious.); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*") (emphasis in original); *Flast v. Cohen*, 392 U.S. 83, 103-104 (1968) ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general").

[20] *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

[21] *Widmar v. Vincent*, 454 U.S. 263 (1981); *Westside Comm. Bd. of Ed. v. Mergens*, 496 U.S. 226 (1990).

individuals or organizations.[22] *Sotto voce*, these cases recognize that when a forum's source of funds is compelled through the government's taxation authority, it may only put that money to uses germane to its core functions.

D. Historical Foundation for Financial Forum Analysis

These cases define the basic contours of the principles underlying financial forum analysis. When the contributions to the forum are compelled, the funds may be used only for purposes germane to the central functions of the creating entity.[23] On the contrary, when the funds are voluntarily given, disbursement can be made for a broader range of purposes without offending First Amendment principles.[24] The rationale for such treatment is lodged deep within our historical understanding of what is essential to a free society.

1. Governmental Compulsion in the Realm of Ideas

In comprehending that understanding, one must begin with a recognition that the right to refrain from advocating an idea is protected with as much fervor as the right to speak one's

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[22] *See Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (grants to non-profit organizations with religious affiliations for sex education); *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 741 (1976) (grants to colleges with religious affiliations); *Bradfield v. Roberts*, 175 U.S. 291, 299-300 (1899) (funding of health care for indigent patients at a hospital with a religious affiliation).

[23] *Rust*, 500 U.S. 173; *Abood*, 431 U.S. 209; *Keller*, 496 U.S. 1.

[24] *Buckley*, 424 U.S. 1.

mind.[25] "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[26] Further, for Constitutional purposes, it matters not whether the transgression on that freedom is accomplished by requiring an individual to verbally proclaim an idea he disbelieves, or by appropriating some measure of his property to the service of such an idea.[27] This protection, enshrined in the First Amendment's provision that "Congress shall make no law . . . abridging the freedom of speech" has a long and distinguished pedigree, as this Court's prior decisions make apparent.

Abood affirmed that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[28] The centrality of this doctrine was emphasized when this Court reasoned that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess

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[25] *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

[26] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[27] *See Abood*, 431 U.S. 209 (union may not force members to financially support non-germane advocacy); *Keller*, 496 U.S. 1 (State Bar may not force member attorneys to fund non-germane advocacy); *Wooley*, 430 U.S. 705 (motorist may not be compelled to display on his license plate a message he finds distasteful); *Barnette*, 319 U.S. 624 (school may not compel student to recite Pledge of Allegiance).

[28] 431 U.S. at 234-35.

by word or act their faith therein."[29]

As a touchstone, *Abood* reached back to James Madison's rhetorical question "'[w]ho does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?'"[30] Mr. Jefferson, drawing upon his survey of political history "swor[e] upon the altar of God eternal hostility to every form of tyranny over the mind of man."[31] His down payment on that oath was the Virginia Act for Religious Liberty, cited by *Abood*, which provides, in pertinent part:

> Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, *or burthens*, . . . tend only to beget habits of hypocrisy and meanness . . . ; that the impious presumption of fallible and uninspired men, . . . [have] set[] up their own opinions and modes of thinking as the only true and infallible, and as such endeavor[] to impose them on others . . . ; *that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical* . . . ; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or

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[29] *Barnette*, 319 U.S. at 642.

[30] 431 U.S. at 234-35 n.31 (quoting 2 The Writings of James Madison 186 (Hunt ed. 1901)).

[31] II Henry Schofield, Essays on Constitutional Law and Equity 363 (Faculty of Law, Northwestern University, ed. 1921).

geometry . . . .[32]

After its passage, Mr. Madison exulted that the Act's provisions "have in this country extinguished forever the ambitious hope of making laws for the human mind."[33] He may have spoken somewhat prematurely, for the goal was still a work in progress in 1794, when Mr. Jefferson opined:

> The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rules can have no authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit.[34]

Though Messrs. Jefferson and Madison were specifically addressing liberty of opinion regarding religion, it is clear that Mr. Jefferson understood this liberty to fully encompass the realm of ideas:

> Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as a medicine and the potatoe [sic] as an article of food. Government is just as infallible too when it fixes systems in physics. Galileo was sent to the inquisition for affirming that the earth was a sphere: the government had declared it flat as a trencher, and Galileo was obliged to abjure his

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[32] Va. Code Ann. sec. 57-1 (1950) (originally enacted January 16, 1786) (emphasis added).

[33] Irving Brant, James Madison: The Nationalist 354 (1948).

[34] Thomas Jefferson, Notes on the State of Virginia 231 (2nd Amer. ed. 1794).

> error. This error however at length prevailed, the earth became a globe, and Descartes declared it was whirled round its axis by a vortex. The government in which he lived was wise enough to see that this was no question of civil jurisdiction, or we should all have been involved by authorities in vortices. In fact, the vortices have been exploded, and the Newtonian principal of gravitation is now more firmly established, on the basis of reason, than it would be were the government to step in, and to make it an article of necessary faith.[35]

The error is of no lesser magnitude when civil authority, instead of prescribing by diktat what shall be orthodox, seeks to advance one opinion over another in the marketplace of ideas.

2. Impermissible Financial Compulsion

Civil authorities must:

> "presume that speakers, not the government, know best both what they want to say and how to say it. . . . [E]ven with the purest of motives, [the government] may not substitute its judgment as to how best to speak for that of speakers and listeners . . . ."[36]

Buckley recognized that money is an integral part of speech: "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political

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[35] Jefferson, *supra* at 232-33.

[36] *Riley v. Nat. Fed. of Blind*, 487 U.S. 781 (1988).

goals."[37] If so, the opposite is a necessary corollary: mandating a contribution forces a person to combine with persons who are not necessarily like-minded in furtherance of a goal not necessarily sought by the contributor. This imposition on an individual's will has been roundly criticized for centuries.

After denominating a citizen's basic, fundamental rights as personal security, personal liberty and private property, William Blackstone observed that

> there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights[;] the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most excessive sense.[38]

Alexander Hamilton, in writing an installment of the Federalist Papers, was surely cognizant of this fact when he noted that "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"[39]

E. Disbursements by the NEA are Inconsistent With the Method by Which the Forum is Funded

Alexander Hamilton observed that:

> In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain an internal evidence which,

[37] 424 U.S. at 22.

[38] I William Blackstone, Commentaries *129.

[39] The Federalist No. 79, at 528 (emphasis in original).

> antecedent to all reflection or combination, commands the assent of the mind.[40]

Such are the preceding principles establishing the right of every person to be free in forming beliefs and opinions by one's own reason and conscience, and the concomitant right to not suffer a financial burden to advance ideas with which one does not agree.

The NEA is essentially a clearinghouse for funds appropriated from the general revenue, derived from taxpayers upon pain of prosecution should they fail to comply with the Internal Revenue Code. There is no option similar to the one addressed in *Buckley* in which taxpayers would be free to choose whether or not to fund the Agency's activities. Thus, the money entrusted to the NEA chair and Council for distribution comes entirely from compelled contributions. Congressional *ipse dixit* that this compelled speech is, in fact, good for the general welfare, cannot disguise the harm such a program wreaks on our First Amendment values. Blackstone understood that "every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, *or a popular assembly*, is a degree of tyranny."[41] In fact, some have argued that the very fact the compelled contribution stems from a governing majority presents a greater, rather than a lesser, threat to the free flow of opinions and ideas:

> It is in the examination of the exercise of thought in the United States that we clearly perceive how far the power of the majority surpasses all the powers with which we are acquainted in Europe. Thought is an invisible

[40] The Federalist No. 31, at 193 (Easton Press 1979).

[41] I Blackstone, *supra* at *126 (emphasis added).

and subtle power that mocks all the efforts of tyranny. At the present time the most absolute monarchs in Europe cannot prevent certain opinions hostile to their authority from circulating in secret through their dominions and even in their courts. It is not so in America; as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, everyone is silent . . . . The reason for this is perfectly clear: no monarch is so absolute as to combine all the powers of society in his own hands and to conquer all opposition, as a majority is able to do, which has the right both of making and executing the laws.

The authority of a king is physical and controls the actions of men without subduing their will. But the majority possesses a power that is physical and moral at the same time, which acts upon the will as much as upon the actions and represses not only all contest, but all controversy.[42]

M. de Tocqueville correctly identifies the awesome power the majority holds and its capacity to eviscerate all competing opinions when combined with the power of government. Indeed, as Mr. Carroll remarked in discussion of the Bill of Rights in the House of Representatives, "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[43]

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[42] I Alexis de Tocqueville, Democracy in America 263 (Phillips Bradley, ed. 1991).

[43] II Bernard Schwartz, The Bill of Rights: A Documentary History 1088 (1971) (quoting debates of the House of Representatives on

While thought may mock all attempts at tyranny, the government has at its disposal, through the power to tax and spend, the means to deliver more than a gentle touch to the liberties of conscience.

Our Bill of Rights, a distinctly anti-majoritarian compilation of safeguards, was proposed so that the liberties of conscience would not suffer government's touch:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[44]

Although direct governmental promotion of matters of secular opinion through an exaction of taxes does not normally raise popular ire to the extent that direct financial subsidies of religious activities does, it should. In responding to an argument in which it was asserted that abridgements of the freedom of speech by a state government may be chimerical, Justice Black stated, "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or

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August 14, 1789).

[44] *Barnette*, 319 U.S. at 638.

causes that they are against."[45] As Mr. Jefferson has eloquently elucidated, freedom in both matters of faith and of opinion derive from precisely the same principle -- civil authority ought to have no power over matters of the mind.

Nor does the fact that the NEA funds a broad array of activities protected by the First Amendment do anything to reduce the offensiveness of the expenditures. Should the proponents of public funding in the Establishment Clause cases have argued that no harm was done because the appropriations were going to a profusion of organizations with differing views on religion, they would surely have found their position unavailing. The offense is in being compelled, in any degree, to directly support the advancement of religious speech or activity. So too, here, the transgression is not lessened because a wide variety of artistic endeavors receive financial support. Because the income side of the ledger for this financial forum is characterized by compulsion, the purposes for which those funds may be spent must be limited to matters otherwise germane to the federal government.

Congress, in creating the NEA, was pursuing no other goal than that expressed in its findings -- to enter the marketplace of ideas with the sole intention of promoting, with taxpayer funds, expressive conduct that garners insufficient support in the marketplace to have the impact Congress desires. Thus, it specifically declared the necessity to financially promote artistic endeavors that "without such assistance, would otherwise be unavailable to our citizens"[46] and to "enable

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[45] *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J. dissenting).

[46] 20 U.S.C. section 954(c)(2).

[artists] to achieve wider distribution of their works . . . ."[47] The effect on speech is not incidental, it is the entire purpose of the program.

Congress has settled on an impermissible mix of income type and subject of expenditure. The ledger does not balance. The power to tax and spend is so great that special care must be taken in ensuring government's hand does not even gently touch matters of conscience. In procuring expressive conduct for its own sake, Congress has re-entered the realm denied it by the First Amendment. Only in an Orwellian world-view would it be possible to argue that free speech is furthered on the back of compelled contributions. At an irreducible minimum, if Congress wishes to foster the expansion of the arts and their broader availability, the money going into the forum must be voluntarily given, *a la* the public financing of presidential campaigns approved in *Buckley*. Anything less fails to comport with Jefferson's admonition that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ."[48]

III. Conclusion

This Court has already held that a labor union, under the auspices of State law, may not compel the support of its members for non-germane purposes. Nor may a State Bar, created pursuant to State law. It would be ironic indeed if the Federal Government, with limited and enumerated powers, had wider latitude in compelling speech than would a State

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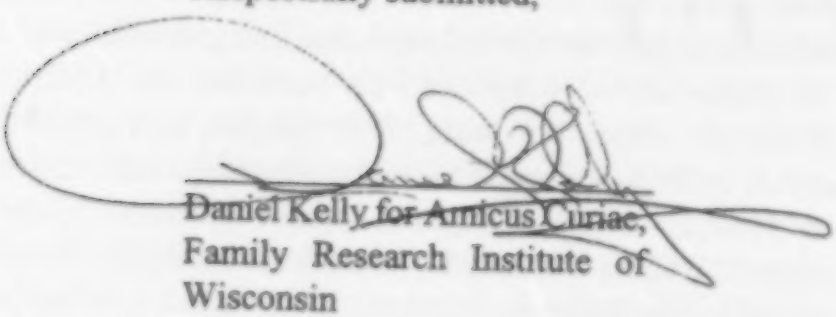
[47] 20 U.S.C. section 954(c)(3).

[48] VA Code Ann. sec. 57-1.

government, with plenary authority in its sphere, or one of its functionaries. The principles of free speech will suffer injury as long its proponents seek to further its goals via money extracted from unwilling donors. Amicus urges this Court to uphold the Ninth Circuit Court of Appeals' decision, but for the reasons herein advocated.

Respectfully submitted,



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